United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-2121

OCT 1 1975

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-2121

DONALD FRANKOS

PLAINTIFF APPELLANT

- against -

J. EDWIN LAVALLEE

J. CZARNETSKY

ARA ASADOURIAN

ROBERT P. WYLIE

DEFENDANT APPELLEE'S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

and

Appendix

JEROME ROSENBERG
OF COUNSEL
BOX B
DANNEMORA, NEW YORK

DONALD FRANKOS
PLAINTIFF - APPELLANT
BOX B
DANNEMORA, NEW YORK

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In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No.

Donald Frankos,

Plaintiff-Appellant,

-against-

J. Edwin La Vallee,
J. Czarnetsky,
Ara Asadourian,
Robert P. Wylie,

Defendant-Appellee,

On Appeal from the United States District Court

for the Northern District of New York

APPELLANTS BRIEF

PRELIMINARY STATEMENT

Plaintiff appeals from a memorandum decision and order rendered by the District Court for the Northern District (Foley D.J.) in favor of the defendants,* which dismissed a complaint

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* Defendant, J. Edwin La Vallee, Superintendent of Clinton Correctional Facility, Dannemora, New York.
Defendant J. Czarnetsky, Deputy Warden of Clinton Correctional Facility, Dannemora, New York.
Defendant Ara Asadourian, District Attorney of Clinton County with offices at Plattsburgh, New York.
Defendant Robert P. Wylie, Attorney at Law with offices at 53 Court Street, Plattsburgh, New York.

brought by plaintiff under the Civil Rights Act pursuant to 42 U.S.C. Sec. 1983, for a jury trial and money damages, and for declaratory judgment pursuant to Section 28 U.S.C 2201. Plaintiff sought one (1) million dollars under compensatory and punitive damages.

The action was summarily dismissed, without the District Court ordering summons to be served upon the defendants, or issuing an order to show cause, dated July 24, 1975.. On July 28, 1975, a timely notice of appeal was filed with the clerk of the Court. The record on appeal is the civil rights complaint, Doc. No. 75-CIV-303.

The action was dismissed as against said defendants, the Court holding, "in view of the firm policy against Federal interference in a state prosecution for failure to state a claim which relief can be granted."

Plaintiff's complaint was prepared by Jerome Rosenberg, and presented in the District Court, as plaintiff Frankos has no knowledge or understanding of the law. Jerome Rosenberg, your writer, is a holder of a Bachelor and a Doctorate degree in law and has in the past, been allowed and permitted to represent inmates both in our federal courts and state courts, on appeals, writs, hearings and trials, without fee, as next of friend and counsel. In this instant appeal, Jerome Rosenberg has prepared

this brief without cost, acting as counsel on behalf of plaintiff Donald Frankos. In the District Court's opinion, (Judge Foley) took judicial notice of your writer.

ISSUES PRESENTED

1. Was plaintiff deprived of his constitutional right to counsel by said defendants?

2. Was plaintiff deprived of his right to access to counsel of his own choice by said defendants?

3. Was plaintiff deprived of his constitutional right of access to the Courts by said defendants?

4. Was plaintiff deprived of his rights, while under suspicion of a crime of murder, placed in solitary confinement (the Box), questioned by police and other state officials at a superintendents proceeding, refused counsel by said defendants throughout all proceedings who held him incommunicado, and under the guise of fairness, at a later date, planted an attorney on prison record, using this as a method to prevent any attorney from seeing plaintiff, and which attorney prevented Frankos from asserting his rights? Did said defendants who acted in common criminal agreement wilfully subject plaintiff to a deprivation of his civil rights?

5. Did the District Court err by dismissing the complaint on the grounds of non-federal interference, lack of jurisdiction,

and for failure to state a claim upon which relief can be granted?

The civil action pursuant to 42 U.S.C., Section 1983.

FACTS

On or about the 28th day of October, 1974, plaintiff Donald Frankos, an inmate at the Clinton Correctional Facility, was removed from the Print Shop where he worked, by correctional and placed in solitary confinement (better known as Unit #14). Said reason given to plaintiff as to why he was placed in Unit 14, was as officials contend, that he was the responsible party who stabbed Richard Bilello, another inmate, who died on or about October 29, 1974.

Susequently, plaintiff was brought before a Superintendent's proceeding where defendant La Vallee and other officials were present. Said defendant La Vallee, and others, directed questions at plaintiff concerning the Bilello stabbing and killing. Immediatly, plaintiff claimed his innocence and requested that Jerome Rosenberg, an inmate lawyer, be permitted to legally advise him and represent him. Said request was rejected, and plaintiff was again (continuously) questioned. Plaintiff was then brought back to (Unit #14).

During this period, State Police and other officials, also, continued to question plaintiff, and at each instant, plaintiff's

request for Rosenberg was denied.

Upon hearing of plaintiff's request for legal assistance of Jerome Rosenberg, I requested permission to see plaintiff and render proper leagl assistance and protect the rights of plaintiff. This was rejected. Your writer then sent for Dennis Cunningham an attorney whom your writer worked together with on other cases. Attorney Cunningham, on or about the first week in November of 1974, arrived at the institution to visit plaintiff Frankos and Rosenberg. At the time of the visit and while discussing the problems of the situation concerning plaintiff, Cunningham asked the institution officials for permission to bring Frankos from Unit #14 to the visiting room for consultation. Shortly thereafter, Deputy Warden Czarnetky approached Cunningham in the visiting room and stated that Frankos could see "no lawyer", as the State assigned a lawyer for him. Upon Cunningham's further demand to see plaintiff, stating that he had been obtained to represent him, defendenat Czarnetsky stated, to the effect, that no lawyer is allowed to see him, and that's that. Said lawyer's name given to Cunningham upon his demand, was defendant Robert P. Wylie.

On or about November 4, 1974, defendant District Attorney Assadourian, presented the case of plaintiff before the Grand Jury of Clinton County. Plaintiff upon his knowledge thatbhis case was put before the grand jury, wrote to defendant attorney Wylie that he wished to appear before the Grand Jury and testify in his own

behalf. Plaintiff, who is not familiar with the law, apparently wrote defendant Wylie that under Section 180.80 and 190.50 of the CriminalProcedure Law, he was entitled to be notified so that he could appear. Wylie wrote back, on three different occasions (see letters, annexed hereto, as plaintiff's exhibits, marked A, B, C), claiming in substance, that plaintiff was not entitled to be notified, nor have the opportunity to testify in own behalf, in light of the fact that he wasn't formally charged, etc.

On December 3, 1974, the Grand Jury of Clinton County returned an indictment charging plaintiff with murder in the second degree.

In the month of February, 1975, at a court proceeding for motions, it was brought out that defendants, Robert P. Wylie was assigned to represent plaintiff by defendant District Attorney Ara Asadourian and defendant Superintendent La Vallee, on or about the first week in November. In whose best interests this assignment was made will shortly appear.

Our above recital of facts aim at presenting to the Court an outline and clear, and clear picture of events having substantial relevence to the propositons of facts and law we now advance and believe will justify our claims of grave deprivations of plaintiffs rights within the framework of our United States Constitution via the Sixth, Eighth and Fourteenth Amendments.

ISSUES OF FEDERAL CLAIMS AND HOW THEY ARE PRESENTED

PLAINTIFF WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL AND OF HIS RIGHT TO ACCESS TO COUNSEL OF HIS OWN CHOICE WITHIN THE STRICTURES OF THE SIXTH AND FOURTEENTH AMENDMENTS BY THE SAID DEFENDANTS, WHO, IN COMMON CRIMINAL AGREEMENT, USED ILLEGAL AND UNLAWFUL METHODS TO KEEP PLAINTIFF "INCOMMUNICADO", RESULTING IN A CLEAR DEPRIVATION OF EQUAL PROTECTION AND DUE PROCESS OF LAW.

It is more than crystal clear, that defendants, under prepense each aiding and abetting the other, with the express intent of conspiring to injure the federally protected rights of plaintiff by depriving him of counsel of his own choosing cannot be disputed. Their arbitrary and tortious conduct borders on the diabolical. Deceit is their "forte", indeed they are, as the late J. Edgar Hoover phrased it, "masters of deceit", but now they are past masters.

First, one wonders "in awe", how on warth a District Attorney and a prison Superintendent, who are, for all intents and purposes, plaintiff foes, would render legal assistance to help the one person they seek to prosecute and convict. There is no need to wonder. The assignment of Wylie by the defendants Asadourian and La Vallee was surely not done in good faith or for humanintarian pupposes, it is pure subterfuge, conceived as foothold to prevent plaintiff from securing proper legal protection and advice and to keep plaintiff under wraps. The very fact that defendants Asadourian and La Vallee sent "their man", under a guise of a defense lawyer, raises a serious question of conflict of interest

and further, the illegality of the assignment is beyond doubt. Plaitniff was never charged with a crime, nor was he ever arraigned in a court of law. Therefore, the District Attorney and the Supreintendent had no right, under color of law, to assign any attorney to represent Frankos. The real strategic purpose behind this maneuver was by having Wylie listed as plaintiff's attorney, the prison officials could refuse to let Rosenberg legally assist him and also prevent another lawyer (Cunningham) from assisting him, which they did, based on the premise that plaintiff had a lawyer.

Indeed, as one proceeds further into the murky water of this weal hatched plot, the part played by defendant Wylie, may in some respects, obtain for him the leading role. For while his actions were well manipulated from behind the scenes, by the other defendants, without defendant Wylie, the plot would never had gotten off the ground. Plaintiff wrote three letters to Wylie requesting his appearance before the grand jury, at which time he would testify in his own behalf. Plaintiff's letters may have been written in an inarticulate manner, and in view of his ignorance of law, may not have been in perfect application to law, but he most definitely cited sections 180.80 and 190.50 of the Criminal Procedure Law in his attempt to testify before the grand jury. His request was clear and concise, but, defendant Wylie, in an excess of zeal to protect the rights of the 'People' wrote back: (see Ex. B and C) of the

the origianl record.

Exhibit B (in part)

"Section 190.50 provides that the District Attorney is not obliged to inform a person that a grand jury proceeding against him is pending."

Exhibit C: (in part)

"Under the particular circumstances of your case, you were not entitled to notice of the hearing or an opportunity to testify in your own behalf.#"

The above, classically exemplifies our contentions that "all" joined in a conspiracy to prevent Frankos from excersizing his legal rights.

Section 190.50 CPL does not mandate that the prosecuotr must notify a person that a grand jury proceeding is pending against him if the person was never arrested or arraigned in local criminal court. But under Section 190.50 (5)(a) CPL, the language commands, if a person is aware of a proceeding against him prior to the filing of an indictment or of any direction to file an information in the matter, and serves upon the District Attorney a written notice, making a request to appear, he has the statutory and constitutional right to do so and appear. (see: Criminal Procedure in New Work, Section 158).

Plaintiff had the opportunity and right to testify pursuant to 190.50(5)(a) etq. Here we have another element to show the design and sole intent of the defendants in hampering Frankos' rights.

If plaintiff would have been permitted the legal assistance of Rosenberg or of attorney Cunningham, his right to testify would have been protected.

At this juncture, in view of Section 190.50(5)(a) CPL, and in further view of defendant's legal(?) advice (Ex. B and C), seriously questions defendant Wylie's ability to defend plaintiff on a "jay-walking" charge, much less a charge of second degree murder, "if he were assigned by a court legally." In this case he was placed there soley for such purpose to prevent appellant from proper legal redress, in what the other defendants thought to be a perfect blockage for excuses under permissbale conduct, to prevent appellant outside help by attorneys.

The defendants, while acting under color of law, maliciously refused to allow plaintiff the right to legal assistance at a critical stage. Once palintiff was placed in solitary confinement on a charge of homicide and brought before a hearing, the denial of legal assistance was a deprivation of plaintiff's Sixth Amendment right to counsel. Subsequently, under questioning by State Police, a further denial of legal asistance only shows, at different stages, the conspiracy we contend.

In Johnson v. Avery, 393 U.S. 483, 488 (1969), the Supreme Court issued it's seminal decision, establishing a right to legal assistance among prisoners. This matter is made even stronger in cases of serious infractions which could lead to loss of good time on criminal charges. (cf. McDonnell v. Wolff, 483 F.

2d 1059, (8th Cir 1973). The New York State Department of Correction recognizing the implications of the Supreme Court ruling, issued a memorandum for liberalizing intra-prison legal assistance, dated June 23, 1972. The pertinent factors in that memorandum establish upon a request by an inmate for legal assistance of another inmate; "he shall be permitted to provide such legal assistance." Plaintiff complied with the proper prerequisite of asking for permission and was denied, which firmly bolsters our position in the following; of a continuing conspiracy to keep plaintiff "incomminicado", so that plaintiff, "not knowing the law" could not protect his rights. In this ambit, said defendant La Vallee went against the State's own memorandum.

The said defendants, La Vallee, Czarnetsky, Asadourian, and Wylie, all acting in concert, did wilfully deprive plaintiff of counsel and the protection of the law.

Czarnetsky's refusal to allow attorney Cunningham to see and represent Frankos, denied plaintiff to access to a lawyer within the strictures of the Sixth and Fourteenth Amendments. See: Martinez v. Procunier, 354 F.Supp. 1092; Gideon v. Wainwright, 372 U.S. 335, 340, 344; 83 S.Ct. 792.

SAID DEFENDANTS, DEPRIVED PLAINTIFFS OF HIS CONSTITUTIONAL RIGHTS OF ACCESS TO THE COURTS.

It can be said that although plaintiff Frankos while in solitary confinement was not charged with a crime, nor was he un-

der the jurisdiction of any court, a grand jury proceeding was pending against him. We develop, that a grand jury body is an arm of the court, and the defendants who were acting in concert, each playing out their assigned roles at a different stage, led to plaintiff's downfall, and the prevention of plaintiff's appearance before the grand jury. This constitutus the most repugnant kind of constitutional deprivation and brings the entire penal system under close scrutiny. Since the grand jury is an arm of the court, plaintiff was denied access to the court by the misconduct of said defendants. Plaintiff states sufficient facts that rise to the dignity of deprivation of constitutional rights and raise a valid cause of action under the Civil Rights Act. Cf. Monroe v. Pape, 365 U.S. 167 (1965).

Defenda nt attorney Wylie, while acting as an agent on behalf of defendants Asadourian and La Vallee, is liable under the Civil Rights Act.

Defendant Asadourian, while performing the function of his office, has quasi-judicial immunity and as such is immune from money damages. However, the outrageous acts in this case remove that mantle of protection and he is liable, further under declaratory judgment his cloak of immunity falls.

The acts and tortious conduct committed in this case is the

product of official lawlessness which is incompatible with a civilized system of justice.

POINT I

THE DISTRICT COURT COMMITTED ERROR BY DISMISSAL OF THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In view of Judge Foley's exposition of the Principles of Law, and the policy he relys on applicable to the issues raised in the complaint of appellant, we shall attempt, in this Brief to expound the various points which he treats upon his view and judgment for dismissal. Suffice it to state that the decision rendered by Judge Foley is erroneous, and tends to chart a new course in the law, which directly conflicts with decisions of this Court and the Supreme Court of the United States. We shall for this Court's convenience, confine ourselves to some summary statements of our position and some few additional very important observations.

Judge Foley, in writing for dismissal, was considering that appellant's complaint might be read as invoking a constitutionally protected right to competent counsel as enunciated within the strictures of the Sixth Amendment, and for all purposes assumed that appellant was really complaining about that he was dissatisfied with the manner in which Wylie had been conducting his defense. The Court further went on to say:

> "..that if plaintiff is dissatisfied, he should present such grievance directly to the state court, and if so inclined, request the appointment of new counsel."

In a further discussion of the above, the Court noted that

apparently attorney Wylie was appointed for appellant by the State Court in which the criminal prosecution was pending. The Court, in rejectingaappellant's complaint stated and we quote:

> "..at this stage of an on-going state criminal prosecution this Federal Court cannot make a finding that Wylie's services are incompetent because that is a determination for the New York Courts. To determine that plaintiff has been deprived of his constitutional rights in the situation that presently exists would be unauthorized interference by this Court with a criminal prosecution in the state courts over which this court lacks jurisdiction."

The Court then relied on the cases of Younger v. Harris, 401 U.S. 37 (1971), and it's companion case, Kugler v. Helfant, ___ U.S.___, 4/28/75, to justify dismissal of appellant's complaint.

In disposing of this issue in his opinion, Judge Foley assumed, apparently for purposes of argument, that the issue at hand was incompetence of appellant's legally assigned attorney, and if there was such a grievance, plaintiff could request appointment of a new counsel. However, Judge Foley's assumption that the plaintiff's counsel was appointed by the Court, and that our claim was incompetence, was clearly unwarranted.

On the most liberal reading of the complaint, nor was there ever a suggestion that our claim was based on incompetence for redress under the Civil Rights Act. The Court's further assumption that Wylie was appointed to plaintiff by the Court is a holding totally unsupported by the facts of the complaint. Wylie

never appeared in court and appellant obtained counsel after receiving an adjournment at his first court appearence.

The District Court's use of the terminology on point to incompetence as a stepping stone and basis for rejecting appellant's cause of action is indicative that the court completly disregarded the valid issues involved. See facts supra.

The answer as to this claim involves, not incompetence or a request for newly appointed counsel, nor does the problem border on a deprivation of effective assistance of counsel by Wylie, because Wylie was never under any circumstances assigned by any Court of Law to represent appellant prior to any indictment , or after indictment. First, the court had no legal authority to assign or appoint an attorney to an individual who is not formally charged with a crime under New York law. Plaintiff was never arrested or charged with a crime, but was placed in solitary confinment in prison. Wylie was placed on prison record as attorney for Frankos by Ara Asadourian and Warden LaVallee, as a barrier soley for the purpose of preventing Rosenberg or any other attorneys from gaining access to him to render him legal aid and protection. Thus, "it would seem in the warped minds" of LaVallee Asadourian and Wylie, that this was a smart gimmick and method to lay a foundation which they dreamed up and thought to be a permissible and legal basis for keeping appellant under wraps, and the right to refuse anyone or any attorneys from seeing appellant while in the "Box", having thus quite nicely tightened the noose around appellant's neck.

The quoted facts in Judge Foley's decision are absolutely contrary to the facts alleged in the complaint of appellant, and disregards the meat of the valid issues and deprivations involved.

Not to be repititious, we will restate in concise form our claimed violations, and refer this Court to our facts and issues for a clear picture of the outrageous acts and tortious conduct committed by the said defendants. (1) Deprivation of appellants right to receive legal aid when placed in solitary on a serious charge. Johnson v. Avery, 393 U.S. 483 (1969). Analysis of the right asserted in Johnson was not the privelege of the jailhouse lawyer to practice law, rather it was the right of an inmate to receive legal assistance from a fellow inmate, See Guajardo v. Luna, 432 F.2d 1324 (5th Cir 1970), moreso where serious charges are pending. See e.g., Wolf supra. (2) Deprivation to the right to communication with attorneys, as indicated supra, Cunningham was refused permission to see appellant whom was retained to be counsel for plaintiff. A basic corollary to the right of access to the courts is the inmates right to communicate with counsel of his own choice or any attorneys. See Blanks v. Cunningham, 409 F.2d 220 (4th Cir 1969); Marsh v. Moore, 325 F.Supp 392 (D. Mass 1971); Nolan v. Scafati, 430 F.2d 548 (1st Cir 1970) and C.F. Sostre v. McGinnis, 442 F.2d 178 (2nd Cir 1971). (3) Appellant was deprived of his rights to access to the courts by the devious methods as claimed in our original complaint, see

e.g. Ex Parte Hull, 1941, 312 U.S. 546, 549, and under a totality of circumstances the defendants with malice did violate appellant's constitutional and civil rights under the First, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, further depriving appellant of due process and equal protection of the law.

The tortious conduct committed by the public officials in this case is repugnant under the pillars and foundation of our civilized system of criminal justice. The defendants deliberately violated every constitutional and civil right of appeallant prior to any valid criminal prosecution or indictment, in fact, when plaintiff first requested Rosenberg, Wylie was not involved until weeks later, yet appellant was under questioning at the very first day of his journey to "Unit 14." We restate LaVallee was in violation of the rules laid down by Albany for inmate legal assistance.

The misinterpretation placed upon the language of the District Court in and of itself should be sufficient to reverse the decision, where the Court arrived at the facts it developed in it's opinion, which facts are erroneous in their entirety. However, in addition to the misconstruing of language, the Court in it's opinion of July 24, 1975, chooses to ignore the very existence of the numerous violations we have raised in "toto" and persists in labeling its holding on a single erroneous factor of appellant being dissatisfied with counsel Wylie.

We bring to surface, the Court was in err to assume any factual contents other than what was alleged by appellant in his complaint, since the Court dismissed the complaint summarily without ordering an order to show cause, or directing issuance of summons to be served upon said defendants with attached complaints. There f ore, the Court was bound to accept plaintiffs claims as true and as stated, and was in error to assume factual contents other than what was alleged.

This Court held in United States ex rel., Hyde v. McGinnis, 429 F.2d 864 (2nd Cir 1970), that when a complaint is dismissed summarily, as a matter of law, the allegations in the complaint must be accepted as true as they are, particularly when an action is brought under the Civil Rights Act.

Appellant under the totality of the circumstances raised in his complaint, states a valid cause of action under the Civil Rights Act for relief, see Monroe v. Pape, 365 U.S. 167 (1965).

POINT II

THE DISTRICT COURT COMMITTED ERR UPON ITS HOLDING AGAINST FEDERAL INTERFERENCE AND LACK OF JURISDICTION.

The Court's holding delivered in it's opinion on point against Federal interference and lack of jurisdiction, "we may feel it fair to say" is a hodge podge of misconstruction of the true facts, incongruously arrayed in a plethora of inopposite citations further adorned with erroneous argument for those propositions.

It was not proper to dismiss on the grounds of non-interference and lack of jurisdiction. First, our issues are in point to matters and past deprivations, not future violations. Prisoners have constitutional rights, Cooper v. Pate, 1964, 378 U.S. 546, and prison officials are bound to respect them, and if they do not, the courts will interfere and grant relief. See e.g. Jackson v. Bishop, 1968, 404 F.2d 571. In our case, the serious deprivations have occured and damage suits are proper, further declaratory relief is appropriate for past deprivations as in this instant case, CF. Jones v. Wittenburg, 323 F. Supp. 93 (ND Cal 1971); Wilwording v. Swenson, 404 U.S. 249 (1971). Our civil rights action is a proper remedy, Clutchette v. Procunier, 328 F. Supp. 767 (ND Cal 1971).

In invoking the doctrine of 'abstention', or the "hands-off doctrine", Judge Foley relied on the case of Younger v. Harris,

supra, to support his holdings against Federal interference. The Court's reliance on the principles in Younger, seems to be misplaced in light to appellant's factual and legal substance for civil rights redress. The United States Supreme Court in Younger reversed the District Court's granting of injunctive relief to a defendant in a pending state proceeding, finding the District Court's action violative a national policy reflected in 28 U.S.C., Sec. 2283, forbidding Federal Courts to stay or enjoin state court proceedings except under the special circumstances of irreparable injury, further holding, in that case there was no allegation of bad faith or harrassment in prosecution made, the principle of Younger, was recently re-affirmed in Kugler v. Helfant, ___U.S.___, 4/28/75/.

The legalistic principles embodied in Younger or their legal impliwations, lends no merit to Judge Foley's holding analogous to appellant's case. First, our allegations do not indicate bad faith or harrassment, "much worse than that" secondly, we do not seek to enjoin or stay any state court proceedings under injunctive relief. Our claims are based on deprivations that occured by prison officials and parties acting as agents prior to any formal criminal charges , although one issue did touch on the grand jury where plaintiff was prevented from asserting his right to appear, but this was in the ambit

of the improper conduct we contend. We seek only to vindicate the grave deprivations which occured to appellant Frankos by the defendants within the scope of the Civil Rights Act of 1871, and which we contend is a proper vehicle to accomplish just that purpose. See Goldfarb & Singer, Redressing Prioners Rights and Grievances, 39 Geo. Wash L. Rev., 175 (1970). Also see, Haines v. Kerner U.S. 30 L.Ed 2d 652 (1972), Monroe v. Pape, supra.

It is well settled that 42 U S.C., Sec 1983 may be invoked only to vindicate "rights secured by the constitution or laws of the United States." See: Antieau, Federal Civil Rights Acts, Secs. 44, 75; Bradford Audio Corp v. Pious, 392 F.2d 67 (2d Cir 1968); Ortega v. Ragan, 216 F.2d 561, 562 (7th Cir 1954) Stiltner v. Rhay, 322 F.2d 314, 315 (9th Cir 1963); Bradford v. Lefkowitz, 240 F. Supp. 969, 976-977 (S.D.N.Y., 1965); Wynn v. Indiana State Dept. of Welfare, 315 F.Supp. 324 (N.D. Ind 1970). It is not used to vindicate "a private right afforded by state laws as distiguished from a constitutional right." Snowden v. Hughes, 321 U.S. 1 6-7 (1943).

A perusal of 1983 states:

> "..42 U.S.C. 1983: Civil action for deprivation of rights provides: 'Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges or immun-

> ities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." (enacted April 20, 1871).

We respectfully contend, appellant's constitutional rights were violated, and the Court committed error by dismissing plaintiff's cause of action under the Civil Rights Act.

CONCLUSION

THE MEMORANDUM DECISION AND ORDER WHICH DISMISSED PLAINTIFF'S COMPLAINT SHOULD BE REVERSED, THE COMPLAINT REINSTATED WITH INSTRUCTIONS TO ORDER THAT SAID COMPLAINTS WITH SUMMONS BE SERVED UPON ALL DEFENDANTS, AND THAT A JURY TRIAL BE GRANTED.

Dated:

Respectfully submitted,
Donald Frankos
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APPENDIX

DONALD FRANKOS
Plaintiff-Appellant

vs

J. EDWIN LaVALLEE, et al
Defendant-Appellee

Northern District of New York
Civil No. 75-CV-308

INDEX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD FRANKOS,

Plaintiff,

-against- 75-CV-308

J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility;

J. CZARNETSKY, Deputy Warden of Clinton Correctional Facility;

ARA ASADOURIAN, District Attorney of Clinton County;

ROBERT P. WYLIE, Attorney-at-Law,

Defendants.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This is a civil rights complaint received by the Clerk at Utica, New York on May 9, 1975. Plaintiff is an inmate of Clinton Correctional Facility who has been indicted for murder in the second degree of Richard Bilello, another inmate. The criminal prosecution is pending in Clinton County. The complaint has been prepared by "the writer" identified in a footnote on page 3 as Jerome Rosenberg, stated to be the holder of a Bachelor and Doctorate degree in law. By memorandum-decision and order, dated March 11, 1975, I did dismiss a civil rights complaint of this plaintiff with eleven separate claims, the main ones being that he was not accorded counsel at the Superintendent's hearing, and that he was being held in the Clinton County Jail to answer new criminal charges.

At a Superintendent's proceeding, permission for Rosenberg to represent Frankos was denied. Request was then made, it is claimed, for Dennis Cunningham, an attorney, to represent plaintiff. It was alleged that when he came to the institution he was refused permission to see Frankos. Apparently, from letters attached to the complaint, Attorney Robert P. Wyliewas appointed for Frankos by the state court in which the criminal prosecution was pending, although

the complaint alleges Attorney Wylie was assigned by two of the named defendants: District Attorney Ara Asadourian and Superintendent J. Edwin LaVallee. Plaintiff charges that as a result his constitutional rights have been violated; that he has been deprived of the right to counsel and the right to access to counsel of his own choice; that he has been held incommunicado; and that he has been deprived of his right to access to the courts. Declaratory judgment and substantial money damages are sought.

The Clinton County criminal courts, whether the Supreme Court or the County Court, in my judgment, have full control of the pending criminal proceeding. What plaintiff is really complaining about is that he is dissatisfied with the manner in which Wylie has been conducting his defense. If plaintiff is dissatisfied, he should present such grievance directly to theState court, and if so inclined, request the appointment of new counsel. At this stage of an on-going state criminal prosecution, this federal court cannot make a finding that Wylie's services are incompetent because that is a determination for the New York courts. To determine that plaintiff has been deprived of his constitutional rights in the situation as it presently exists would be the unauthorized interference by this court with a criminal prosecution in the State courts over which this court lacks jurisdiction. At the highest level there has been proclaimed a fundamental policy against federal interference with state criminal prosecutions, and that policy has been recently reaffirmed in Kugler v. Helfant,_____U.S. ____, 4/28/75, referring to Younger v. Harris, 401 U.S. 37 (1971), and its companion cases.

The complaint is dismissed in view of this firm policy against federal interference in a state psosecution for failure to state a claim upon which relief can be granted.

It is so Ordered.

Dated: July 24, 1975

Albany, New York